NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

AFF OF MAILING

Supreme Court, U.S.
FILED
SEP 2 1982
Alexander L. Stevas, Clerk

RECEIVED
SEP 3 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

A-241

DAVID J. BROWN

Petitioner

-v-

STATE OF NORTH CAROLINA

Respondent

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Cheif Justice of the United States and Circuit Justice for the Fourth Circuit:

The petitioner, David J. Brown, prays that an order be entered extending the time for filing a Petition for Writ of Certiorari in the Supreme Court of the United States in this case by thirty (30) days to and including October 31, 1982, or in the alternative October 11, 1982. Petitioner believes that this application is not being filed less than ten (10) days prior to the date that the petition is due; however, petitioner has recently learned that a question has recently been raised regarding the interpretation of North Carolina'a Rules of Appellate Procedure pertaining to the date a judgment is entered for purposes of filing a Petition for Writ of Certiorari in the Supreme Court of the United States. The confusion has not yet been resolved by either the Supreme Court of the United States or the Supreme Court of North Carolina, and petitioner may, therefore, be one day late in filing this Application.

The pertinent dates are:

July 13, 1982: The Supreme Court of North Carolina filed an opinion affirming petitioner's convictions and death sentences for two murders. State v. Brown, ____ N.C. ____, ____S.E.2d ____ (1982).

August 2, 1982: Judgment was rendered by the Supreme Court of North Carolina pursuant to Rule 32(b) of the North Carolina Rules of Appellate Procedure.

September 11, 1982: Expiration of time for filing Petition for Writ of Certiorari in this Court, unless extended, if this Court interprets Rule 20.4 of the United States Supreme Court Rules and the North Carolina Rules of Appellate Procedure to require that the time for filing the Writ begins on the date the North Carolina Supreme Court opinion is filed rather than on the date it is mandated.

October 1, 1982: Expiration of time for filing Petition for Writ of Certiorari in this Court, unless extended, based on the petitioner's interpretation of Rule 20.4 of the United States Supreme Court Rules and the North Carolina Rules of Appellate Procedure.

October 11, 1982: Expiration of a requested thirty (30) day extension of time for filing a petition in this Court, if this Court determines that the sixty (60) days within which to tile the Petition for Writ of Certiorari begins to run from the date the opinion was filed by the North Carolina Supreme Court.

October 31, 1982: Expiration of a requested thirty (30) day extension of time for filing a petition in this Court, if the sixty (60) days within which to file Petition for Writ of Certiorari begins to run from the date judgment was mandated by the North Carolina Supreme Court.

This motion for extension of time is being filed at this date because of the apparent confusion over the date when the Petition for Writ of Certiorari is due in this Court. Counsel for petitioner had calculated the date that the Petition for Writ of Certiorari is due as October 1, 1982, sixty (60) days from the date judgment was entered by the North Carolina Supreme Court. After conferring with counsel for Michael Edward Pinch, who recently requested an extension of time from this Court in order to file a Petition for Writ of Certiorari, petitioner's counsel has learned that there is now a question regarding when the sixty (60) days begins to run. This application is, therefore, now being made despite petitioner's belief that October 1, 1982, is the correct date marking the expiration of time for filing the Petition for Writ of Certiorari in this Court and that September 21, 1982, is the final date for filing this Application. If petitioner's interpretation of the rules is found to be incorrect, the Petition for Writ of Certiorari, unless time is extended, will be due September 11, 1982, and this Application was due September 1, 1982.

If this Court determines that counsel for petitioner has interpretated the rules incorrectly, petitioner prays that this Court grant his application for an extension of time because of the seriousness of this case and because of the extraordinary circumstances created by the recent confusion concerning proper interpretation of North Carolina'a Rules of Appellate Procedure.

As grounds for the thirty (30) day extension, petitioner shows the following:

1. Petitioner was found guilty after a jury trial in the Superior Court of Rockingham County, North Carolina, of two counts of first degree murder and was sentenced to death on each count.

2. Petitioner duly appealed his convictions and sentences to the Supreme Court of North Carolina, assigning as error, inter alia, several federal constitutional claims. The Supreme Court of North Carolina affirmed the convictions and the sentences, holding that petitioner was denied his constitutional right to due process in the guilt phase of his trial but the error was harmless beyond a reasonable doubt. As to the issues raised in the sentencing phase of petitioner's trial, Justice Exum dissented, expressing the view that petitioner was entitled to a new sentencing hearing.

3. Petitioner intends to seek review in this Court under 28 U.S.C. Section 1257(3) of his federal constitutional claims which he presented to and which were rejected on the merits by the North Carolina Supreme Court. At least one of the issues, the constitutionality of the North Carolina Supreme Court's construction of the death penalty statute, is also being presented to this Court in Michael Edward Pinch v. State of North Carolina (No. 82- , filed August 31, 1982).

4. The extension of time is sought for the following reasons:

a. Petitioner is an indigent, death sentenced inmate who was represented at trial by the undersigned court appointed counsel.

b. Petitioner's counsel has a very active and heavy work load consisting of numerous other previously scheduled criminal and civil trials, and although counsel has proceeded diligently on petitioner's behalf, more time is needed to adequately prepare a Petition for Writ of Certiorari.

WHEREFORE, petitioner respectfully requests an order extending the time for filing a Petition for Writ of Certiorari to and including October 31, 1982, or in the alternative, October 11, 1982.

This 2 day of September, 1982.

Respectfully submitted,

VAN CAMP, GILL & CRUMPLER, P. A.
Attorneys for Petitioner

By: James R. Van Camp

James R. Van Camp
P. O. Box 106
Raleigh, North Carolina 27602
Phone: (919) 821-5393

NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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DAVID J. BROWN

Petitioner

-v-

STATE OF NORTH CAROLINA

Respondent

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CERTIFICATE OF SERVICE

I hereby certify that I served the annexed Application for Extention of Time in which to File for Writ of Certiorari on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Mr. Isaac T. Avery, III
Special Deputy Attorney General of the
State of North Carolina
Justice Building
Post Office Box 629
Raleigh, North Carolina 27602

All parties required to be served have been served.

This 2 day of September, 1982.

VAN CAMP, GILL & CRUMPLER, P. A.
Attorneys for Petitioner

By: James R Van Camp
James R. Van Camp
P. O. Box 106
Raleigh, North Carolina 27602
Phone: (919) 821-5393

NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

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|---|---|---|
| DAVID J. BROWN,<br>Petitioner | ) | |
| v. | ) | AFFIDAVIT OF SERVICE |
| STATE OF NORTH CAROLINA,<br>Respondent | ) | |

STATE OF NORTH CAROLINA)
COUNTY OF WAKE ) ss.

Sally Hamilton Scherer, being sworn, states:

1. I am an attorney licensed to practice law in the State of North Carolina. I am employed by Van Camp, Gill & Crumpler, P. A. and am an associate of James R. Van Camp, attorney for petitioner David J. Brown.

2. On September 2, 1982, at approximately 1:00 p.m. E.S.T., I personally placed the original and two copies of the enclosed Application for Extension of Time in an envelope properly addressed to the Clerk of this Court, with express mail service postage prepaid, and deposited the envelope in a mailbox under the exclusive care and custody of the United States Postal Service within the City of Raleigh, State of North Carolina.

Sally Hamilton Scherer
Sally Hamilton Scherer

Sworn to before me this
2nd day of September, 1982.

Sharon A. Gill
NOTARY PUBLIC

My commission expires: 8/20/86

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SUPREME COURT U.S.

82 5542
NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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DAVID J. BROWN,

Petitioner

v.

STATE OF NORTH CAROLINA

Respondent

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MOTION TO PROCEED IN FORMA PAUPERIS

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The petitioner, David J. Brown, by his undersigned counsel asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Brown's Affidavit in support of this Motion is attached.

This 11th day of October, 1982.

VAN CAMP, GILL & CRUMPLER, P. A.
Attorneys for Petitioner

By _____
James R. Van Camp
Post Office Box 106
Raleigh, North Carolina 27602-0106
(919) 821-5393

NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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| | | |
|---|---|---|
| DAVID J. BROWN, Petitioner | ) | |
| v. | ) | AFFIDAVIT |
| STATE OF NORTH CAROLINA Respondent | ) | |

I, David J. Brown, being duly sworn, depose and say in support of my Motion for leave to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty, I am unable to pay the costs of this cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for this cause.

4. James R. Van Camp was appointed to represent me at trial and on appeal because I am indigent. He is representing me in this petition to the United States Supreme Court.

5. I believe that I am entitled to redress.

6. The nature of this cause is briefly stated as follows:

I was convicted in the Superior Court of Union County, a trial court of the State of North Carolina, of the murder of two individuals and was sentenced to death on both counts. I am being held at the North Carolina Central Prison in Raleigh, North Carolina. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

David J Brown
David J. Brown

NORTH CAROLINA

WAKE COUNTY

The foregoing Affidavit of David J. Brown was subscribed and sworn to before me this 5th day of October, 1982.

Sharon A. Lake
Notary Public

My Commission Expires: 8/20/86

IN THE SUPREME COURT OF NORTH CAROLINA 82 5542

STATE OF NORTH CAROLINA )
)
v ) No. 30A81 - Union
)
DAVID J. BROWN )

FILED
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IN THE OFFICE OF
CLERK, SUPREME COURT
OF NORTH CAROLINA

Before Rousseau, Judge, at the 8 December 1980 Criminal Session of Superior Court, Union County.

Defendant was charged in indictments, proper in form, with the murders of Christina S. Chalflinch and Shelly Diane Chalflinch. Due to pretrial publicity, the trial court ordered the trial moved from Moore County, where the crimes occurred, to Union County. The jury found defendant guilty of the two counts of first degree murder and recommended that defendant be sentenced to death for both convictions. Based on the jury's recommendation, the trial court imposed a death sentence for each conviction. Defendant appeals to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Issac T. Avery III, for the State.

James R. Van Camp and Douglas R. Gill, for the defendant.

CARLTON, Justice.

Defendant brings forth several assignments of error in the guilt determination phase of his trial and several alleged errors relating to the sentencing phase of his trial. After a careful consideration of these assignments, as well as the entire record before us, we find no prejudicial error in any of these proceedings and affirm his convictions and the sentences imposed.

I.

At trial, evidence for the State tended to show that Shelly Diane Chalflinch, aged twenty-six, and her daughter, Christina S. Chalflinch, aged nine, resided in apartment 9 of the Marriage Quarters behind the Pinehurst Hotel in Pinehurst, North Carolina. They visited with Ms. Chalflinch's father, G. W. Frye, in Aberdeen on Sunday, 24 August 1980. Mr. Frye never saw his daughter or granddaughter alive after that evening.

On the morning of Tuesday, 26 August 1980, the bodies of Ms. Chalflinch and her daughter were found in a mutilated condition in the Chalflinch apartment. Police officers who entered the apartment saw blood on the floors and walls of the apartment. Pieces of flesh were scattered throughout the living area of the apartment. Small pieces of furniture had been overturned and several chairs were broken. It was hot in the apartment and the bodies had already begun to decompose. Ms. Chalflinch's body had been mutilated beyond recognition, and several feet of her intestines protruded from a large wound to her abdomen. Christina's body also bore multiple stab wounds and a brown electrical cord had been wrapped around her neck.

A bloody knife blade, broken at both ends, with the inscription "R. H. Forschne," was found in the apartment.

Following the initial investigation, the apartment was secured and remained padlocked until the time of trial. Sergeant Don Davis of the Pinehurst Police Department was placed in charge of the investigation and kept the only key to the apartment.

The bodies of the Chalflinches were taken to Chapel Hill on 26 August 1980 where autopsies were performed. An autopsy

performed on the body of Ms. Chalflinch revealed approximately 100 stab and cut wounds all over her body. At least 20 of these wounds were to the facial area, 12 were in the neck area, and 16 stab wounds on the right arm appeared to be defensive in nature. In addition to the numerous wounds to the chest and shoulder area, a large gaping cut extended down the left leg from buttock to ankle and a V-shaped penetrating stab wound in the vaginal and rectal area created a virtual hole in the body. The medical examiner found a ring under the edge of the liver in the abdominal cavity. The pathologist who performed the autopsy testified, "I could place my own hand and arm through the wound in her genital area up to the area where the ring was." The ring was silver in color and had a large rectangular surface with a heraldic pattern with two animals on each side and two shields and a crown on top. In the pathologist's opinion, Ms. Chalflinch died as a result of "a combination of stab and incised wounds to all parts of her body, that some wounds might possibly have been inflicted after death and that, given the condition of the body and the temperature of the Chalflinch apartment, death could have occurred on Monday night, 25 August."

An autopsy performed on the body of Christina Chalflinch revealed multiple stab wounds, slashes, puncture marks and extensive mutilation of the genital area with a portion of the tissue removed. The head had a large number of stab wounds, one of which extended through the brain from right to left. The electrical cord which had been wrapped around the neck left a faint bluish mark. Four wounds in the chest area penetrated into the tissues of the chest and abdomen. Seven of the multiple

stab wounds in the abdominal region penetrated internal organs. In the pathologist's opinion, Christina Chalflinch died as a result of multiple stab wounds to the head, chest and abdomen.

On 28 August 1980 SBI Agent Wade Anders obtained permission from the defendant to search his home, apartment 4 at the Marriage Quarters complex. Defendant was asked to sign a form indicating his consent to a search of his apartment. He signed the form after it was read to him and after he talked with a friend. The form was signed at 5:21 p.m. on 28 August 1980. The apartment was searched that same evening, while defendant was present. Items seized during the search included the tool box in which defendant kept his kitchen equipment for his job as a cook at the Pinehurst Hotel. In the box were knives bearing the inscription "R. H. Forschner" on the blades.

A forensic serologist with the SBI examined the apartment of Ms. Chalflinch and the area outside it on 28 August 1980. He observed blood all over the apartment. Additionally, he performed luminol and phenolphthalein tests to determine the presence of blood undetectable to the human eye. Through use of these tests, blood was discovered in the corner of the kitchen in the shape of two / partial footprints of the balls and toes of the feet, side by side. Patterns of blood were discovered outside the front door of Ms. Chalflinch's apartment and also on the deck outside the front door, on the fourth and tenth steps leading down from her apartment, and on the concrete pad at the foot of the steps. Blood was also observed between the concrete pad and the first stepping stone, and this bloodstain was in a shape resembling a bare foot. At the door to defendant's apartment, visible bloodstains

were found on the concrete stoop. The luminol test indicated the presence of blood on the doorknob. The tool box taken from defendant's apartment had a small spot on the lid which tests revealed to be blood and the blade of one of the R. H. Forschner knives tested positive with phenolphthalein. A bloodstain was also found on a pillow at the head of defendant's bed. Blood was found in other areas throughout the apartment and bare footprints of blood were found all over the floor in the kitchen. On that evening, defendant had a cast on his left hand.

An SBI agent who qualified as an expert in the field of fingerprint and palm print identification testified that a latent palm print on the wall of the bedroom of Ms. Chalflinch's apartment was the same as that of the left palm print of the defendant.

Several friends of defendant's testified that the ring found in Ms. Chalflinch's body was the ring normally worn by defendant.

Other evidence for the State tended to show that defendant attended a party on Sunday evening, 24 August 1980, where he played the role of disc jockey. He drank alcoholic beverages throughout the evening and took at least five "Black Beauties." During the party defendant was wearing his ring. At approximately 11:30 p.m., defendant and a group left the party and went to a nightclub known as the Crash Landing. Members of the Southern Pines Police Department on patrol observed the defendant walking on the highway near the Crash Landing at approximately 2:10 a.m. on Monday, 25 August 1980. He was staggering, carrying his shoes and was barefooted. The officers gave him a ride to the kitchen entrance of the Pinehurst Hotel. They left him there at approxi-

mately 2:45 a.m.

A co-worker of defendant testified that she saw the ring in question on the Saturday before 25 August 1980. On the following Monday at approximately 7:00 a.m., she saw the defendant at work and he had two bandaids on his left hand in the thumb area. She did not observe the ring at that time. Defendant was in pain and told her that he had cut his hand.

Evidence for the defendant tended to show that the night shift supervisor at the Pinehurst Hotel saw the defendant in the hotel's front office between 2:30 and 3:00 a.m. on 25 August 1980. He left the front of the hotel at approximately 3:00 a.m.

A co-worker and friend of defendant's testified that defendant had been in apartment 9 of the Marriage Quarters before 25 August 1980. Two residents of apartments in the Marriage Quarters testified that they had been at home on the night of 24 August 1980 and had not heard anything unusual. One of these residents saw Ms. Chalflinch at approximately 11:00 p.m. on 24 August 1980. They talked and she stated that she had to do some laundry. He saw her through his apartment window again around 12:30 or 1:00 a.m. on 25 August 1980, heading toward the laundry.

Becky Mills, a nurse at Moore Memorial Hospital, testified that she first saw the defendant at approximately 11:00 p.m. on 25 August 1980. He was in the emergency room recovering from surgery resulting from cut tendons on his left hand and had a cast on his left arm. He left the hospital at approximately 4:10 a.m. on 26 August 1980.

Gaston Yarborough and Raymond Pate, employees of the hotel, testified that they passed by the Marriage Quarters on

their way home from work on Monday, 25 August. They left work at approximately 11:00 p.m. They heard a lady hollering from the direction of the Marriage Quarters and a banging noise. Yarborough drove by the Marriage Quarters and saw that lights were on only in the end apartment on the corner. Pate testified that he did not see Ms. Chalflinch's car in the parking lot when he went to work at approximately 2:30 p.m. on 25 August 1980. At 11:00 p.m., as he was walking to his truck to leave work, he heard noises from the direction of the Marriage Quarters. He heard a young girl's voice say, "Leave her alone, leave her alone." He then drove by the Quarters. He saw lights on only in the apartment in the right-hand corner. He looked up toward the lighted apartment and saw a white male with sandy blonde hair jump from the balcony. Pate told the police about this on 27 August 1980. He saw the person again on the following weekend and followed him into the hotel but lost him. He reported this to the police the same day, but they never inquired about it further until the Sunday prior to trial. On cross-examination, Pate testified that the person jumped off the balcony outside of apartment 12 and that he saw no one near apartments 9 and 10.

Upon receiving the jury verdict finding the defendant guilty of both murders, the court convened the sentence determination phase of the trial before the same jury. The State essentially relied on the testimony presented at the guilt phase but also offered the testimony of Roy Junior Brown. Brown testified that he was in Moore County jail as a prisoner at the time defendant was placed in the jail. Brown asked defendant what he was charged with and defendant said that he was charged with a

double homicide. Brown testified:

> He said he murdered two people. He called one of their names Shelley (sic). He told me he killed them with a knife. He said he couldn't understand why they didn't give him his ring back, that they gave him his watch back, and it got broke off his arm, the band broke off, and I asked him where his ring was or something, I don't recall exactly what I asked him, but anyhow he said the ring turned up in one of the bodies.

Defendant presented several witnesses in his behalf. Several co-workers testified that they had known him for some time and had never seen or heard him threaten anyone with any act of violence and that he got along well with other people. Other testimony indicated that he had never been seen with a weapon; that he was an honest and dependable worker; that he was a quiet person and did not use profanity. Some of defendant's relatives testified essentially that they had never known defendant to be violent and that he was always friendly and self-controlled.

At the conclusion of the testimony, the trial court instructed the jury on the sentencing phase. Two aggravating circumstances were submitted to the jury: (1) whether the murder was especially heinous, atrocious or cruel, and (2) whether the murder was part of a course of conduct in which the defendant engaged and whether that course of conduct included the commission by the defendant of other crimes of violence against another person. Six mitigating circumstances were submitted to the jury: (1) whether the defendant had no significant history of prior criminal activity, (2) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirement of law was impaired, (3) whether, although the act itself may have been horrible, the defendant had not shown

himself to be otherwise evil, (4) whether the defendant had no previous conviction of offenses involving injury to another person, (5) whether prior acts of defendant's behavior were inconsistent with the act of which he was convicted, (6) whether any other circumstance or circumstances arising from the evidence had mitigating value. The jury found both aggravating circumstances and all six mitigating circumstances. The jury also answered affirmatively the issues of whether, beyond a reasonable doubt, the aggravating circumstances found were sufficiently substantial to call for the imposition of the death penalty and of whether, beyond a reasonable doubt, the aggravating circumstances outweighed the mitigating circumstances. The following instruction appeared on the sheet handed the jurors immediately following the issue last mentioned: "If you answer issue 4 'No,' indicate life imprisonment under 'recommendation as to punishment.' If you answer issue 4 'Yes,' indicate death under 'recommendation as to punishment.'" Thereupon, the jury recommended that defendant be sentenced to death. Identical issues were submitted in both murder cases and the answers and recommendations were the same.

The trial court then entered judgment imposing the death penalty for each of the crimes committed. From these judgments, the defendant appealed of right to this Court.

II.

GUILT-INNOCENCE PHASE

Defendant presents numerous contentions about the guilt-innocence portion of his trial. We discuss each of these below.

A.

In pre-trial discovery motions and motions made during the trial and immediately after judgment was entered, defendant sought a trial court order allowing him to inspect the premises known as apartment 9 of the Marriage Quarters, the scene of the crimes. The trial court denied defendant's motion in each instance. The apartment had been cordoned off and had been under the control of the Pinehurst Police Department from the time the victims' bodies were found until the time of the trial. Defendant claims that he was entitled to inspect the crime scene under G.S. 15A-903(d) and/by virtue of his constitutional right to due process of law.

Defendant contends before this Court that an inspection of the crime scene was critical to his defense. He argues that the only way the State could prove that he committed the murders was to show that they occurred between 3:00 a.m. and 7:00 a.m. on 25 August 1980 and that he needed the opportunity to inspect the crime scene in order to discover whether there was any evidence which tended to show that the victims were alive after this period. An inspection of the crime scene, therefore, was critical to the preparation of his defense.

We first turn to defendant's contention that he was entitled to view the crime scene under G.S. 15A-903(d). That statute provides in pertinent part:

> (d) Documents and Tangible Objects. -- Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the

> State as evidence at the trial, or were obtained from or belonged to the defendant.

(Emphasis added.)

Defendant contends that "tangible objects" include such objects as an apartment. We do not agree. "Tangible objects," as used in this statute, refers only to tangible, movable objects, and not to buildings or rooms.

Rule 16 of the Federal Rules of Criminal Procedure, the federal counterpart of our G.S. 15A-903, specifically confers the right to "discover buildings or places." Our statute, on the other hand, does not include "buildings or places" in the list of things which may be discovered. This omission is, we think, significant. Had our Legislature intended for "buildings or places" to be included in the statute, it would have said so in the same words utilized in the federal statute. Thus, defendant is not entitled, under the terms of G.S. 15A-903(d), to inspect the crime scene.

Defendant's contention that denial of his motions to view the crime scene amounted to a denial of due process of law is persuasive. We start with the proposition established by the Supreme Court of the United States that there is no general constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). As that Court has stated, "the Due Process clause has little to say regarding the amount of discovery which the parties must be afforded . . . ." Wardius v. Oregon, 412 U.S. 470, 474, 93 S. Ct. 2208, 2212, 37 L. Ed. 2d 82, 87 (1973). We must, therefore, consider defendant's claim under the facts of this particular case. Here, the record discloses that the apartment occupied by the victims was secured and cordoned off by the Pinehurst Police Department from the time the bodies were discovered on 26 August 1980 through the time of defendant's trial. The defendant sought on several occasions to obtain access to the apartment in order to search for exculpatory evidence. The record does not disclose that the defendant would have been unwilling for his attorneys to be accompanied by police personnel so that no harm would be done to the crime scene. The defendant cogently presented the theory of his defense to the trial court. The State relied heavily on information gained from the crime scene for its case against the defendant. On these facts, we think it a denial of fundamental fairness and due process for defendant to be denied, under police prosecutorial supervision, a limited inspection of the premises of the crime scene. We emphasize, however, that our holding is limited to the particular facts of this case and our holding is in no way to be construed to mean that police or prosecution have any

obligation to preserve a crime scene for the benefit of a defendant's inspection. The crime scene here was preserved by the police for the several months from the time the bodies were found until the trial was conducted and rudimentary fairness would have allowed defendant to inspect these premises under these circumstances.

Our inquiry does not end here, however. Error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error committed was harmless beyond a reasonable doubt. G.S. 15A-1443(b); Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); see Moore v. Illinois, 434 U.S. 220, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977); Milton v. Wainwright, 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972); Schneble v. Florida, 405 U.S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972). Overwhelming evidence of guilt may render constitutional error harmless. Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969).

As stated in Chapman, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710-11. Here, we declare our belief that the trial court's error in denying defendant to the crime scene was harmless beyond a reasonable doubt of other overwhelming evidence of defendant's guilt.

Our reading of the record here leaves no doubt that the trial court's error was harmless. This is so because evidence of this defendant's guilt was overwhelming. A ring identified as

one previously worn by defendant was found in the body of Ms. Chalflinch. A bloody palm print lifted from the bedroom wall of the apartment was unquestionalby identified as being that of the defendant. A bloody and broken knife blade similar to ones owned by defendant and used by him in his work was found at the crime scene. In addition to the blood at the crime scene, blood was located at the entrance of defendant's apartment and throughout the apartment. Defendant confessed to his cellmate, after being arrested, that he had murdered two people, one named Shelly, with a knife and that his ring had turned up in one of the bodies.

In summary, we hold that the trial court erred under the facts of this case in failing to allow defense counsel to view the crime scene but that the trial court's error was harmless beyond a reasonable doubt. See United States v. Valenzuela-Bernal, ____U.S.____, ____S. Ct. ____, ____ L. Ed. 2d ____ (No. 81-450, decided July 2, 1982).

B.

Following the testimony of Mike Pagan, Marlene Ethal McIntosh, Ann Quick and Debra McLaughlin, witnesses who testified that the ring found in Ms. Chalflinch's body belonged to defendant, defense counsel requested copies of the statements which each witness had given to the police. At that point, the court noted that it had reviewed in camera the statements of the four witnesses and, based on its review, entered findings that the statements were not inconsistent with the witnesses' testimony, that the statements contained no evidence which exonerated the defendant, and that defense counsel was not entitled to copies of the statements given to the District Attorney's office prior to trial. Copies of the statements were made and were placed in a sealed envelope. Following the trial court's entry of this order, defense counsel asked that the court seal not only the four statements specifically requested, "but any statements written whether in longhand or otherwise." The trial court denied this motion.

By this assignment defendant requests that we review the sealed statements of the four witnesses to determine if the trial court ruled properly. He then contends, however, that he has a constitutional right to inspect the statements himself and that the procedures enunciated by this Court in State v. Hardy, 293 N.C. 105, 235 S.E. 2d 828 (1977), are inadequate in capital cases. Finally, defendant contends that the trial court erred in failing to inspect and seal any other written statements.

In Hardy this Court established the rules for our trial courts to follow in instances where a specific request is made at trial for disclosure of evidence in the State's possession

that is obviously relevant, competent and not privileged. As Justice Copeland stated, "justice requires the judge to order an in camera inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged. The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious." Id. at 127-28, 235 S.E. 2d at 842. The North Carolina discovery procedures, unlike the federal statute, do not automatically entitle the defendant to such statements at trial.

> Instead, . . . since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, Brady and Agurs require the judge to, at a minimum, order an in camera inspection and make appropriate findings of fact. As an additional measure, if the judge, after the in camera examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review.

Id. at 128, 235 S.E. 2d at 842.

Here, the trial court clearly complied with the mandates of Hardy with respect to the statements of the four named witnesses. Having found as a fact that the statements were not inconsistent with their testimony at trial and that they contained no evidence exculpatory to the defendant, the trial court declined to order them provided to the defense counsel and correctly ordered them placed in a sealed envelope. In accordance with the review procedure set out by Hardy, we have opened the sealed envelopes, read the statements in question and concur in every respect with the trial court's findings and order.

Nor are we persuaded that the procedure adopted in Hardy

should be modified. Defendant has presented no new reasons for our doing so, and we continue to believe that the Hardy procedure fully assures a defendant that no material and exculpatory pretrial statement will be suppressed. Ordering the statements placed in sealed envelopes provides for effective appellate review. See State v. McLean, 294 N.C. 623, 242 S.E. 2d 814 (1978); State v. Tate, 294 N.C. 189, 239 S.E. 2d 821 (1978).

Finally, we reject defendant's contention that the trial court failed to comply with Hardy with respect to "any statements written whether in longhand or otherwise." This request by defense counsel was obviously a shotgun tactic. Our review of the record discloses no evidence of any other statements which were available for the court to inspect and seal. Defendant apparently would have this Court assume that some other statements were available and that the trial court knew of them. This we are unwilling to do. We have no reason to suspect that any other statements were available and find no indication from the record that any witness was asked by defense counsel if he or she had previously given a statement in writing to police personnel.

These assignments of error are overruled.

C.

Defendant next contends that the trial court erred in denying his several motions concerning discovery of information in the State's possession indicating that a witness had seen a white male jumping from the balcony of a Marriage Quarters apartment on the evening of 25 August 1980, which information had not previously been provided defendant. We find no merit to defendant's contention.

After learning that law enforcement officers had been told by a witness, Raymond Pate, that he had observed a white male jump from a balcony of a Marriage Quarters apartment on Monday evening, the trial court conducted a lengthy voir dire. The voir dire revealed that officers had discounted this testimony because Pate had indicated to them, upon viewing the apartment complex that he had actually seen the man jump from the balcony of an adjacent apartment. Moreover, this information had not been disclosed to the District Attorney. It had been independently discovered by counsel for defendant approximately one week prior to trial. During the course of this voir dire, defendant moved for a dismissal, a mistrial, and a continuance. All three motions were denied by the trial court.

At the conclusion of the voir dire, the trial court found the facts as noted above and concluded that the District Attorney had not intentionally tried to hide any information contrary to the pre-discovery order entered in the cause and further found that the defense attorney had had substantially the same information as the District Attorney. We find the trial court's findings of fact fully supported by the evidence adduced at the voir dire and that those findings properly support the conclusions of law.

G.S. 15A-910 gives the trial court ample authority to provide relief when either the State or defendant fails to comply with the discovery provisions of Chapter 15A. However,

> the exclusion of evidence for the reason that the party offering it has failed to comply with the discovery statutes granting the right of discovery, or with an order issued pursuant thereto, rests in the discretion of the trial court. . . . The exercise of that discretion,

absent abuse, is not reviewable on appeal.

State v. Hill, 294 N.C. 320, 331, 240 S.E. 2d 794, 801-02 (1978) (citations omitted).

We find no abuse of discretion here. The record reveals that the District Attorney was not aware of this information until trial. The record further reveals that defense counsel became aware of the information a week before trial and had, in fact, talked with the witness. Most importantly, the witness testified before the jury and the jury heard a full account of what he observed on that evening. On these facts, there is no abuse of discretion. See State v. Allison, 298 N.C. 135, 257 S.E. 2d 417 (1979); State v. McCoy, 302 N.C. 1, 277 S.E. 2d 515 (1981).

In a related argument, defendant contends that the trial court erred in refusing to permit him to inquire into the knowledge of a State's witness concerning another witness who allegedly had seen the decedents alive after 12:30 a.m. or 1:00 a.m. on 25 August 1980. On cross-examination of Sergeant Davis, a Pinehurst police officer, defendant asked, "Did you determine that one or more persons may have seen Diane Chalflinch after 1:00 a.m. on Monday morning?" The witness answered affirmatively. Defendant then sought to obtain the names of the witnesses and the State's objections were sustained. Defendant then attempted to have the questions answered for the record and the trial court refused. The trial court's explanation was that, "You have asked me to look and I looked in camera at a statement a witness gave where you contended that somebody saw Diane Chalflinch alive after midnight, and I have ruled that you were not entitled to that information at this time." Defendant contends that (1) he was

entitled to have the witness answer the question, and (2) at the very least, the question should have been answered for the record.

While we agree with defendant that the trial court should have allowed the witness to answer for the record, that alone does not warrant a new trial. The record discloses that regardless of defense counsel's inability to get his questions answered, the witness who claimed to have seen Ms. Chalflinch alive at 12:30 or 1:00 a.m. on 25 August 1980, Clarence Harding, was available to the defense and testified for the defense. Because defendant got this testimony before the jury he was in no way prejudiced by the trial court's earlier rulings and is not entitled to a new trial on this ground.

In this instance, we are bound by the trial court's ruling that the information was not exculpatory. We have not been provided a copy of the statement provided the trial court for in camera inspection and on which the trial court based its previous ruling. Moreover, the basis for the court's ruling in this instance was that it had previously found the information in the statement not to be exculpatory to the defendant. There is no indication that defendant requested that this statement be sealed or otherwise preserved for our review as provided by Hardy.

These assignments of error are overruled.

D.

Defendant next attacks the admission into evidence of numerous items taken during a warrantless search of his apartment. The State sought to justify the search on the basis of consent. He argues that the search of his apartment was not based on lawful consent because (1) the evidence did not support a

finding of consent, (2) a search warrant had supplanted the effect of any consent; and (3) evidence relevant to a determination of lack of consent had been improperly excluded. We discuss these arguments seriatim.

Defendant essentially contends that the totality of the circumstances surrounding his "consent" impels the conclusion that it was not voluntarily given. He notes that he had been questioned by the SBI the day before the consent was given and that he had been followed by SBI agents for several miles prior to being stopped and questioned. He also notes that he was kept under surveillance by police personnel who later went with him to the security office of his employer, where he was kept for another two and one-half hours in the presence of several officers. Such circumstances, defendant argues, are tantamount to an arrest and the "psychological atmosphere" in which his consent was obtained should preclude allowance into evidence of those items seized during the search.

When the validity of a consent to search is challenged, the trial court must conduct a voir dire hearing to determine whether the consent was in fact given voluntarily and without compulsion. State v. Cobb, 295 N.C. 1, 243 S.E. 2d 759 (1978). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48, 36 L. Ed. 2d 854, 862-63 (1973); accord, State v. Jolly, 297 N.C. 121, 254 S.E. 2d 1 (1979); State v. Vestal, 278 N.C. 561, 180 S.E. 2d 755 (1971).

Here, the trial court conducted an extensive voir dire and heard the testimony concerning the events leading up to the signing of the consent form. The court found that the two SBI agents had talked with defendant and others about the alleged murders of the Chalflinches and informed defendant that they wanted to search his apartment; that they read defendant a printed form entitled "Consent to Search " which fully advised him that the search was for "any other material of evidence of any crime which they may desire," and that the officers did not have any authority to make such search without his consent; that the defendant signed the consent form in the presence of two police officers and a friend of defendant's with whom he had consulted; that defendant stated that he understood the form and understood his rights; that defendant was not under the influence of any alcohol or drugs; that no force or coercion was used against him or any promises made to him. From these findings of fact the trial court concluded that the defendant voluntarily, willingly and understandingly consented to the search of his premises and that any items seized as a result of the search were admissible at his trial.

We find that the trial court's findings of fact are amply supported by the evidence adduced at the voir dire hearing and that these findings fully support the trial court's conclusions of law. Taking into account all of the factors enunciated in Schneckloth, we hold that defendant's consent to the search was voluntarily given free from coercion in any form.

Defendant next contends that, even assuming he had given consent, such consent was superseded and negated by the

issuance of a search warrant which was read to him prior to the search of his apartment. We disagree.

Defendant cites no authority for the proposition that obtaining a search warrant negates prior consent to the search. It is clear from the record before us that the State relied on a consensual search and, as discussed above, the trial court properly ruled that defendant's consent was freely and voluntarily given. We cannot agree with defendant's reasoning that obtaining the warrant negates the consent originally given. Assuming the State had a valid search warrant, it had two bases to justify the search of defendant's apartment. At trial, the State had every right to rely on either. See State v. Ratliff, 281 N.C. 397, 189 S.E. 2d 179 (1972).

Nor do we find, as defendant contends, any evidence to conclude that defendant withdrew his consent as a result of the issuance of the search warrant. Indeed, the evidence is that, until the time of his arrest some one and one-half hours later, defendant was cooperative with the search and was allowed to go in and out of his apartment unrestrained. We hold that issuance and service of the search warrant in no way negated the consent originally given by defendant for the search of his premises and that the items seized during the search were admissible at trial.

Finally, defendant contends the trial court improperly refused to permit testimony on several matters relating to the circumstances leading to his giving consent to the search of his apartment. We have previously discussed the trial court's treatment of the defendant's challenge to the consensual search and find it unnecessary to do so again. Most of the matters which

defendant now contends he was not allowed to pursue, such as the number of persons present at the time of the search, were otherwise before the trial court. The trial court had before it adequate information concerning the totality of circumstances leading to the defendant's consent for the search. We reject defendant's contention here that the trial court abused its discretion by refusing, in effect, to relitigate the issue of consent.

These assignments of error are overruled.

E.

Defendant next challenges the admission of certain items of evidence: photographs of the victims taken at times prior to the murders, items seized during the search of defendant's apartment on which there were traces of blood, jewelry found in defendant's apartment and knives owned by defendant similar to the one found at the crime scene.

We have reviewed the photographs and testimony concerning the other items of evidence and find that they were properly admitted into evidence. We note only that the inability of the forensic serologist to state that the traces of blood found on items seized from defendant's apartment came from either of the victims goes to the weight or credibility of his testimony and not its admissibility. See State v. Arnold, 284 N.C. 41, 199 S.E. 2d 423 (1973).

F.

Defendant next assigns error to certain portions of the jury charge. Specifically, he contends that the trial judge erred (1) by expressing an opinion that defendant committed the

killings, (2) by mischaracterizing the theory of the defense, (3) by incorrectly stating the evidence, (4) in more forcefully stating the law favorable to the State, and (5) by implying that the jury could find as a fact something that was not contained in the record. We have examined the portions of the charge to which defendant assigns error and find that the jury was properly instructed. These assignments of error are without merit and are hereby overruled.

G.

Counsel for defendant has been helpful to this Court in arranging his brief so that the remaining contentions concerning the guilt phase of defendant's trial are summarily presented. Counsel acknowledges that many of these issues have been previously addressed and candidly concedes that he would have to "overcome substantial precedent" in order to prevail. Without unduly burdening this Court with extended argument, defendant requests that we review these issues and reconsider our prior holdings. We address them below.

(1) Defendant first contends that in a capital case, an individual voir dire of the jurors should be allowed in order for defendant to receive a fair trial. He argues that it is inherently impossible for other members of the jury pool not to be affected by the types of questions asked potential jurors in a capital case. Defendant cites no new authority for his position and, indeed, this Court has previously rejected this argument. E.g., State v. Oliver, 302 N.C. 28, 274 S.E. 2d 183 (1981); State v. Taylor, 298 N.C. 405, 259 S.E. 2d 502 (1979); State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752 (1979); State

v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979), cert. denied, 448 U.S. 907 (1980). On the point here presented, we reiterate our holdings in these cases. This assignment of error is overruled.

(2) Defendant next contends that he was denied due process and the effective assistance of counsel when the trial court refused to order that bench conferences be recorded. Defendant cites no authority for his position and our research discloses none. Defendant's bare assertion that the ability of counsel to raise points and record their disposition during trial was "so chilled" that he was denied the effective assistance of counsel and due process is simply unpersuasive. This assignment of error is overruled.

(3) Defendant next contends that he was unconstitutionally tried by a "death qualified" jury. He contends that a "death qualified' jury is more likely to convict than a jury which is not "death qualified." This Court has previously rejected the argument here presented and is not inclined to disturb those holdings. See, e.g., State v. Oliver, 302 N.C. 28, 274 S.E. 2d 183; State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510; State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979), cert. denied, 446 U.S. 941 (1980).

(4) Defendant next contends that the trial court improperly limited the number of additional peremptory challenges which he requested. He argues that one charged with two capital offenses should be given additional peremptory challenges. This Court rejected a similar argument in State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752. This assignment of error is overruled.

(5) Defendant next contends that his arraignment was illegal because the proceedings were remanded for findings of fact by the district court concerning the reasons for the continuance of his probable cause hearing. He argues that the result was to eliminate his hearing because of an imminent indictment.

This assignment of error is without merit. The failure to conduct a formal arraignment itself is not reversible error. State v. Smith, 300 N.C. 71, 265 S.E. 2d 164 (1980). The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges. State v. Small, 301 N.C. 407, 272 S.E. 2d 128 (1980). Moreover, there is no constitutional requirement for a preliminary or probable cause hearing. State v. Hudson, 295 N.C. 427, 245 S.E. 2d 686 (1978). A probable cause hearing is unnecessary after the grand jury returns an indictment. State v. Lester, 294 N.C. 220, 240 S.E. 2d 391 (1978). As this Court discussed in Hudson, a probable cause hearing is not designed to afford a means of discovery to defendant. Its function is to determine whether there is probable cause to believe the crime has been committed and that defendant committed it. This assignment of error is overruled.

(6) Defendant next contends that the only source for a conclusion by the jury that premeditation and deliberation existed was the evidence concerning the nature and number of the victims' wounds. As we understand it, defendant is contending that his conviction of first degree murder should not stand because the

essential ingredients of premeditation and deliberation were based upon a presumption.

This argument is clearly without merit. Evidence of the premeditation and deliberation required to sustain this defendant's conviction was supplied by circumstantial evidence, not by any presumption. The nature and number of the victims' wounds, as defendant notes, is one circumstance from which an inference of premeditation and deliberation could be drawn. There are, however, many others appearing of record. The trial court correctly submitted the issues of premeditation and deliberation to the jury.

(7) Defendant next contends that the trial court erred by failing to submit its charge to the jury in writing as requested by defendant. Defendant cites no authority in support of his position and no persuasive reasoning has been advanced. We note that the jury requested no clarification of the trial court's instructions and that it returned a verdict in just over one hour. Nothing in the record indicates that the jury was in any way confused or unable to understand or remember the trial court's instructions. This assignment of error is overruled.

(8) Defendant next contends that the trial court impermissibly expressed its opinion by refusing to grant the defendant's request that he be referred to by his name and not as "the defendant." This is particularly true, defendant contends, when the victims are referred to by name. This Court is unable to imagine the slightest prejudice resulting to defendant from the historical practice in our trial courts of referring to the defendant as "the defendant." This assignment of error is overruled.

(9) Defendant next contends that the trial court improperly failed to charge the jury on the issue of his good character. We disagree. Defendant did not introduce character evidence. The testimony offered in his behalf did not indicate his general reputation among a group of people but consisted only of several witnesses' personal opinion of the defendant. As this Court stated, in rejecting a similar contention, in State v. Williams, 299 N.C. 652, 662, 263 S.E. 2d 774, 781 (1980), "Such evidence is not competent character evidence and the trial judge's failure to instruct the jury on this evidence is accordingly not error."

(10) Defendant next contends that the trial court improperly denied his request for the appointment of a polygraph examiner. Defendant argued that he had no independent recollection of the events occurring between 4:00 a.m. and 7:00 a.m. on 25 August 1980, and that polygraph results could be used to show his state of mind. This Court has recently written at length concerning the appropriate legal principles for appointment of assistance of an expert and find it unnecessary to repeat that extensive discussion here. See State v. Partin, 303 N.C. 55, 277 S.E. 2d 410 (1981). Suffice it to say that the decision of whether to appoint an expert is a matter within the discretion of the trial judge and will not be disturbed absent an abuse of that discretion. Here we can perceive no abuse. See State v. Easterling, 300 N.C. 594, 268 S.E. 2d 800 (1980); State v. McDowell, 301 N.C. 279, 271 S.E. 2d 286 (1980), cert. denied, 450 U.S. 1025 (1981); State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752.

(11) Defendant next contends that he was entitled to

receive, upon request, criminal records of the State's witnesses. G.S. 15A-903 nowhere provides for discovery of the criminal records of the State's witnesses. Indeed, a provision authorizing the discovery of such material was included in the draft of the original bill and was subsequently deleted. G.S. § 15A-903, Official Commentary (1978); accord, State v. Smith, 291 N.C. 505, 523-24, 231 S.E. 2d 663, 675 (1977). This assignment of error is overruled.

III.

SENTENCING PHASE

Defendant next assigns several errors relating to the sentencing proceedings. We discuss these contentions seriatim.

A.

Defendant first contends that the trial court improperly submitted the aggravating circumstance that the murders were "especially heinous, atrocious, and cruel," G.S. § 15A-2000(e)(9) (1978). In support of this argument, defendant argues that (1) the only evidence on which this finding could have been based was also an essential element of the State's proof of first degree murder and (2) the only evidence suggesting unnecessary cruelty to the victim was the multiplicity of wounds which were not established beyond a reasonable doubt as having occurred before the death of the victim.

Defendant's first contention is based on this Court's holdings in State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979) and State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551. In those cases we held that the underlying felony in a first degree murder conviction based upon the felony-murder doctrine could not be

submitted as an aggravating circumstance. Recognizing the doctrine of merger, we held that the underlying felony merged with the murder convictions and therefore use of the same felony to enhance the punishment violated the double jeopardy provisions of the federal constitution. We did not hold that the jury was prohibited from considering the evidence justifying the conviction of the underlying felony but held only that the underlying felony itself could not be used as an aggravating circumstance.

Here, of course, defendant was not tried under the felony-murder rule. He was tried and convicted of these first degree murders on the basis of premeditation and deliberation. No underlying felony was involved. This Court has rejected similar arguments in State v. Oliver, 302 N.C. 28, 274 S.E. 2d 183, and State v. Hutchins, 303 N.C. 321, 279 S.E. 2d 788 (1981). In Oliver, we interpreted Cherry and Goodman to apply only to the underlying felony itself and not to the facts surrounding the commission of the felony. In Hutchins, we rejected the argument that the facts underlying the State's theory of the case merged with the offense and could not be used to enhance the penalty.

We also disagree with defendant that this aggravating circumstance should not have been submitted because the multiplicity of wounds was the only fact to support a jury finding necessary to establish the murder as one especially heinous, atrocious and cruel because the evidence does not support the conclusion beyond a reasonable doubt that the wounds inflicted were administered before the death of the victims. Here, defendant is relying on the testimony of the pathologists who stated that they could not be certain that all of the victims' wounds were inflicted

prior to death. Defendant's contention is that an especially heinous, atrocious and cruel murder must be one inflicted on a conscious victim.

This assignment is patently without merit. We will not lengthen this opinion by again reciting the gruesome and gory facts summarized above. Indeed, it is unnecessary for us to answer the question whether this aggravating circumstance may be employed when the evidence establishes that a portion of the defendant's acts took place after the death of the victim. This is so because there was abundant evidence here that many of the wounds were inflicted prior to death. Additionally, the character and severity of the wounds support the submission of this aggravating circumstance. Of particular importance is the pathological evidence that some of the wounds appeared to be defensive, some sixteen on Ms. Chalflinch's right arm. Indeed, the inference from the evidence appearing in this record arises above the level of that we have reviewed in previous cases in which we have upheld the admission of this particular aggravating circumstance. This assignment of error is overruled.

B.

Defendant next contends that the trial court erred in refusing to submit requested mitigating circumstances that (1) the defendant did not act in a calculated manner, (2) the defendant did not act for pecuniary gain; and (3) the defendant was under the influence of mental or emotional disturbance.

This Court has previously defined a mitigating circumstance as follows:

A defintion of mitigating circumstance approved

> by this Court is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, which may be considered as extenuating, or reducing the moral culpability of killing, or making it less deserving of the extreme punishment than other first-degree murders.

State v. Irwin, 304 N.C. 93, 104, 282 S.E. 2d 439, 446-47 (1981). That the murder was not committed in a calculated manner is not, in our opinion, a mitigating circumstance. Indeed, it is difficult for this Court to understand how a murder committed after premeditation and deliberation is not done in a calculated manner.

Moreover, the State does not have the burden of proof that, in a given capital case, no mitigating circumstances exist. State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510. It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury. State v. Hutchins, 303 N.C. 321, 279 S.E. 2d 788. Our review of the record discloses no evidence from the defendant that he did not act in a calculated manner. Indeed, as discussed in connection with other contentions above, the evidence is to the contrary. From the evidence that a bloody knife blade was found in the victim's apartment which was of the same type as the knives in defendant's tool box, the jury could have, and apparently did, infer that the knife used to kill the victims was taken up to their apartment by the defendant for that purpose.

We express no opinion on whether the evidence shows that defendant did not act for pecuniary gain. Even assuming that it does, the evidence merely shows the absence of an aggravating circumstance and not the presence of a mitigating one.

At trial, defendant contended that he was entitled to the mitigating circumstance that he acted under the influence of mental or emotional disturbance as contemplated by G.S. 15A-2000(f)(2). In support, he relied on the testimony concerning his use of alcohol and drugs on Sunday evening, 24 August 1980.

We have answered this issue in State v. Irwin, 304 N.C. at 106, 282 S.E. 2d at 447-48. There, we said:

> voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a mental or emotional disturbance under G.S. 15A-2000(f)(2). Voluntary intoxication, to a degree that it affects defendant's ability to understand and to control his actions . . . is properly considered under the provision for impaired capacity, G.S. 15A-2000(f)(6).

(Citation omitted.) The trial judge here correctly followed the law established by Irwin. He submitted the mitigating circumstance of impaired capacity and the jury found this mitigating circumstance in both murders.

This assignment of error is overruled.

C.

During the sentencing phase of the defendant's trial, the State presented the testimony of Roy Junior Brown (Roy). Roy testified that defendant told Roy in jail that he, defendant, had murdered two people using a knife and that he did not understand why his ring was not given back to him. Defendant's next contention is that this testimony was improperly admitted because it referred only to the guilt or innocence of the defendant and not to any aggravating or mitigating circumstances. Defendant's contention is without merit.

G.S. 15A-2000(a)(3) provides that the State is not

required to resubmit evidence presented during the guilt determination phase of the case at the sentencing phase. However, all such evidence is competent for the jury's consideration in passing on punishment. Moreover, "[a]ny evidence which the court deems to have probative value may be received." G.S. § 15A-2000(a)(3)(1978). Here the trial court obviously deemed Brown's testimony to be relevant and to have probative value. Because the testimony would have been admissible at the guilt phase of the trial, we are unwilling to hold that evidence clearly proper for the jury to consider under the statute had it been presented at the guilt phase of the trial is inadmissible simply because it was introduced at a later stage of the proceedings.

Additionally, the evidence is relevant to rebut evidence submitted by the defendant at the guilt phase of the trial which would support mitigating circumstances. This is especially true with respect to the mitigating circumstance that defendant was suffering from a mental impairment as a result of alcohol and drug use. The testimony from the witness/Brown that defendant stated that he had killed two persons with a knife and that his ring was later found in one of the bodies is some evidence that defendant was not so intoxicated at the time of the murders that he was not aware of what he was doing and could not remember them. The testimony also tended to rebut other testimony introduced by the defendant at the guilt phase concerning his good conduct in the past and was, therefore, relevant to the mitigating circumstance of "although the act itself may have been harmful, the defendant has not shown himself to be otherwise evil" by showing defendant's lack of remorse.

Roy

For the reasons stated, this assignment of error is overruled. However, we would note for the benefit of the trial courts that the better procedure, in a situation in which the evidence relates only to guilt or innocence, is to present such evidence during the guilt determination phase.

Finally, under this contention, defendant argues that the trial court erred by refusing to allow him to question the assistant district attorney on voir dire concerning promises made by the State to the witness who testified at the sentencing phase. We think the trial court acted properly in refusing to allow defendant to examine, as a hostile witness, a fellow officer of the court concerning information which defendant failed to illicit from the witness whose testimony he was seeking to discredit. During the lengthy voir dire, Roy Brown took the stand and stated that sometime after revealing the information to officers, he was taken before a judge and tried for two of the counts for which he was in prison and that he received a suspended sentence and his bond was substantially reduced. With this information from the voir dire, defendant had, it seems to us, sufficient information to pursue his concern that Roy Brown's testimony was in exchange for favorable treatment by the State. However, when the witness testified before the jury, Roy Brown was not asked any questions about any such consideration or about the disposition of charges against him. We agree with the State that the appropriate avenue of inquiry into the bias of a witness is to ask the witness himself.

This assignment of error is overruled.

D.

Defendant next argues that the trial court improperly charged the jury concerning the possibility of parole for a life sentence. We find no error in these instructions.

The jury, after some deliberation during the sentencing phase, inquired of the court concerning the chances for parole from a life sentence. The defendant requested that the jury be instructed that "life sentence means life sentence, and death means death." Instead, the court gave the following instruction:

> I instruct you that the question of eligibility for parole is not a proper matter for you to consider in recommending punishment and it should be eliminated entirely from your consideration and dismissed from your mind. In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what it says, imprisonment in the State Prison for life. You should decide the question of punishment according to the issues submitted to you by the Court wholly uninfluenced by consideration of what another arm of the government might or might not do at some time in the future.

After the jury had been given this instruction, defendant requested that the court charge the jury as follows:

> Under the law of the State of North Carolina, a defendant sentenced to life imprisonment for first degree murder is never entitled to a parole and a defendant who is sentenced to two consecutive terms of life imprisonment for first degree murder is not even eligible for consideration for parole until 40 years has passed.

The trial court refused his request. Defendant assigns error to the refusal to charge the jury according to his requests.

While the tendered instruction by the defendant is a correct statement of the law, that submitted by the trial court is also correct and in accordance with instructions previously approved by this Court. The trial court is not required to

instruct the jury in the precise words requested by the defendant. The instruction given by the trial court conveyed the substance of defendant's first request. No more is required.

The long-standing rule in this jurisdiction is that a defendant's eligibility for parole is not a proper matter for consideration by a jury. E.g., State v. Conner, 241 N.C. 468, 85 S.E. 2d 584 (1955). That is exactly what the trial court told the jury. Defendant's requested instruction concerning the eligibility for parole, although a correct statement of the law, was not appropriate information for the jury to consider in its deliberations. We find no error in the instruction given by the trial court or in its refusal to instruct the jury according to defendant's requests.

This assignment of error is overruled.

E.

The trial court submitted each of the two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11). Defendant argues that the submission of each murder as an aggravating circumstance for the other violates double jeopardy. This Court has rejected a similar argument, based on similar reasoning, in State v. Pinch, ____ N.C ____, ____ S.E. 2d ____ (No. 43A81, filed 2 June 1982). Justice Copeland, writing for the Court, has presented a thorough discussion of this contention in Section XII of the opinion in Pinch, ____ N.C. at ____, ____ S.E. 2d at ____, and it is unnecessary for us to repeat it here. Suffice it to say that for the reasons stated in Pinch, this assignment of error is overruled.

In connection with this contention, defendant also argues that the trial court committed prejudicial error by submitting an aggravating circumstance which was not listed by the State in its response to defendant's motion for a bill of particulars. In its motion for a bill of particulars defendant requested notice of which aggravating circumstances would be relied on by the State at trial. The State responded, but did not include in its list the aggravating circumstance that the murder was part of a course of conduct in which the defendant engaged in crimes of violence against another person, G.S. § 15A-2000(e)(11)(Cum. Supp. 1981). Defendant contends that (1) due process requires such notice, and (2) the order of the trial court concerning defendant's motion for a bill of particulars required the disclosure.

This Court has previously rejected defendant's due process argument in State v. Taylor, 304 N.C. 249, 283 S.E. 2d 761 (1981). There, we reasoned that the only aggravating circumstances on which the State may rely are enumerated in G.S. 15A-2000(e) and that this statutory notice is sufficient to meet the constitutional requirements of due process. We reiterate that holding here.

We also disagree with defendant that the trial court erred in submitting this aggravating circumstance because the State did not comply with the order resulting from his motion for a bill of particulars. The trial court's order stated:

> That the Court ORDERS that the State disclose to the defendant's counsel the aggravating circumstances in the above referenced case; that the Court further ORDERS that the State may disclose the aggravating circumstances without prejudice and that the State may rely on other

circumstances as the evidence and circumstances become known to the State.

The State did disclose the other aggravating circumstances on which it eventually relied. We think the trial court's order merely required the State to disclose those aggravating circumstances which it knew it intended to use at the time it responded to the motion for the bill of particulars. In that light, the State complied with the trial court's order. We do not believe the trial court intended to limit the State to those disclosed. Indeed, the court clearly indicated that its order was to be "without prejudice" to the State.

While not essential to our decision here, we do agree with the State that G.S. 15A-925 does not authorize a trial court to order the State to disclose its aggravating circumstances prior to trial. That statute provides:

> (b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(Emphasis added.)

The trial court ordered the State to "disclose to the defendant's counsel the aggravating circumstances in the above-referenced case." We agree with the State that aggravating circumstances are not "factual information" within the meaning of G.S. 15A-925.

This assignment of error is overruled.

F.

Defendant next contends that the trial court erred in

instructing the jury that it must recommend that defendant be sentenced to death if it found that the aggravating circumstances outweighed the mitigating circumstances. This argument, based on similar reasoning, has been recently rejected by this Court in State v. Pinch, ____ N.C. ____, ____ S.E. 2d ____ (1982), and State v. Williams, ____ N.C. ____, ____ S.E. 2d ____ (No. 70A81, filed 2 June 1982). These opinions fully discuss this assignment of error and we find it unnecessary to lengthen this opinion by repetition of the discussions contained in those cases. For the reasons stated in Pinch and Williams, this assignment of error is overruled.

G.

Defendant next contends that, in a capital case, the trial court on request should instruct the jury on the consequences of the inability of all of its members to agree on a sentence. Defendant asked the trial court to charge that a sentence of life imprisonment would be imposed in the event that the jury failed to reach unanimous agreement on the proper sentence.

Again, this Court has specifically addressed and rejected the argument here presented by the defendant in State v. Hutchins, 303 N.C. 321, 279 S.E. 2d 788; State v. Johnson, 298 N.C. 355, 259 S.E. 2d 752. We reiterate those holdings and overrule this assignment of error.

H.

Defendant finally contends that the death penalty constitutes cruel and unusual punishment under the eighth amendment of the United States Constitution and may not be imposed.

This assignment of error has been rejected on numerous occasions, *e.g.*, Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979), and we are presented with no additional reasoning to change our position.

IV.

As noted in State v. Rook, 304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied, ____ U.S. ____ (No. 81-6143, March 22, 1982), G.S. 15A-2000(d)(2) directs this Court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[1] As stated in Rook, this mandate serves as a check against the capricious or random imposition of the death penalty, and our review function in this regard is limited to those instances where both phases of the trial of the defendant in a capital case have been found to be free from prejudicial error. In fulfilling this role, we are sensitive not only to the mandate of the Legislature but to the constitutional dimensions of our review.

Mindful of the very serious responsibility placed on us by G.S. 15A-2000(d)(2), we have carefully reviewed the record of

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[1] This Court has not yet stated whether the "similar cases" for comparison purposes consist of cases in which the death penalty was imposed or all first degree murder cases regardless of the punishment. As noted in my concurring opinion in State v. Pinch, ____ N.C. ____, ____ S.E. 2d ____ (No. 43A81, filed 2 June 1982), I would compare the death sentence in the case at issue to all similar first degree murder cases regardless of the punishment.

of this case along with the briefs and oral arguments. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances submitted. We also find nothing in the record to indicate that the sentence of death was imposed under the influence of passion, prejudice and any other arbitrary factor.

The record before us reveals two of the most blood-thirsty and brutal crimes which have ever been reviewed by this Court. We again refrain from repeating gory details summarized at the beginning of this opinion. Suffice it to say that this defendant has been convicted of stabbing to death a young mother and her child, with no apparent motive, and extensively mutilating their bodies. The bloody facts disclosed by the record before us leave this Court with no choice but to conclude that the sentence of death imposed is not disproportionate or excessive considering both the crime and the defendant. We, therefore, decline to exercise our discretion to set aside the death sentence imposed.

In all phases of the trial below, we find

No error.

No. 30A81 - State v. Brown

Justice Exum dissenting as to sentence.

For the reasons stated in Part I of my dissenting opinion in State v. Pinch, ____ N.C. ____, ____S.E.2d ____ (filed 2 June 1982), I believe it was prejudicial error for the trial judge to instruct the jury that it had a duty to recommend the death sentence if it answered certain issues favorably to the state.

Therefore I vote to vacate the death sentence and to remand for a new sentencing hearing. I concur with the result reached by the majority in the guilt phase of the case.

FILED
Jul 13 11 49 AM '82
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

Death Case

# JUDGMENT

## SUPREME COURT OF NORTH CAROLINA

APPENDIX B

XXXXXX TERM, 1982

STATE OF NORTH CAROLINA

*vs.*

DAVID J. BROWN

*No.* 30A81 Union *County.*

*This cause came on to be argued upon the transcript of the record from the Superior Court* Union *County:*

*Upon consideration whereof, this Court is of opinion that there is* no *error in the record and proceedings of said Superior Court.*

*It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the*

*Honorable* J. PHIL CARLTON, Associate *Justice, be certified to the said Superior Court, to the intent that the* XX

PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

*And it is considered and adjudged further, that the* Defendant Do Pay

*the costs of the appeal in this Court incurred, to wit, the sum of*

*****TWO-HUNDRED FORTY-ONE AND 50/100***** *dollars ($* 241.50 *),*

A TRUE COPY
J. GREGORY WALLACE
CLERK OF THE SUPREME COURT
GREENSBORO, N.C.

*and execution issue therefor. Certified to Superior Court this* 3rd *day of* August *19* 82.

A TRUE COPY

*By* Mrs. Peggy T. Boyd
CHIEF DEPUTY CLERK

3rd August 19 82

J. GREGORY WALLACE
*Clerk of the Supreme Court.*
By: Mrs. Peggy T. Boyd
Chief Deputy Clerk

Appendix B

STATE V. PINCH, _____ N.C. _____, 292 S.E.2d 203, 229 (1982) (Exact retyping of slip opinion)

Both the prosecutor and the trial court advised the jury that it had a duty to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N. C. Criminal Pattern Jury Instructions §150.10 (1980). [16]

Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudicially withdrew from the jury its final option...to recommend a life sentence notwithstanding its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." State v. Johnson, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); see State v. Barfield, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979); cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137 (1980). Moreover, defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the

16 Similar instructions about the jury's duty to return a certain sentencing verdict, based upon its affirmative findings under G.S. 15A-2000(c), were given in three other death cases previously decided by our Court, in which no corresponding exception or assignment of error was raised on appeal: State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137 (1980); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, _____ U.S. _____, 102 S. Ct. 431, 70 L. Ed. 2d 240 (1981); and State v. Rook, _____ S. Ct. _____, _____ L. Ed. 2d _____ (1982).

aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in Goodman, explained that:

> [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.

Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17]

17 There is no constitutional infirmith in such an instruction. See, e.g. Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) (cited in the dissent).

NO. 41A81 - State v. Pinch

Justice Exum dissenting as to sentence.

I.

I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones analysis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury must return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, have made it abundantly clear that the majority's interpretation is not constitutionally required.

In one of its first cases construing our death penalty statute, this Court noted, "[t]he first maxim of statutory construction is to ascertain the intent of the legislature. To do this, this Court should consider the statute as a whole, the

spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." State v. Johnson, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979). In Johnson, this Court recognized that our death penalty statute was enacted following a quintet of cases all decided by the United States Supreme Court on 2 July 1976. These cases struck down mandatory death penalty statutes in North Carolina, Woodson v. North Carolina, 428 U.S. 280 (1976)(plurality opinion), and Louisiana, Roberts v. Louisiana, 428 U.S. 325 (1976)(plurality opinion), but sustained death penalty statutes which, in varying degrees, sought to control the discretion exercised in capital sentencing in Georgia, Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion); Florida, Proffitt v. Florida, 428 U.S. 242 (1976)(plurality opinion); and Texas, Jurek v. Texas, 428 U.S. 262 (1976)(plurality opinion). This Court noted in Johnson that these five cases "made clear that neither unbridled, unguided discretion nor the absence of all discretion in the imposition of the death penalty is constitutionally permissible." 298 N.C. at 58, 257 S.E.2d at 607 (emphasis supplied). After further discussion of United States Supreme Court decisions and various provisions of the Model Penal Code, upon which our statute was largely based, this Court concluded in Johnson, 298 N.C. at 63, 257 S.E.2d at 610:

> In summary, there are a number of controlling factors governing the interpretation of our death penalty statute. Unbridled discretion in the imposition of the sentence is not permitted. On the other hand, sentencing juries must

> have some discretion to determine in a rational and consistent manner those cases in which the death penalty should be imposed. Juries are to be guided in this process by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused. Thorough jury instructions, which incorporate and reflect the definitions accorded to these criteria and which are fully applied to the facts of each case, must be given. In each case the process must be directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the necessity of balancing them against each other in determining whether to impose the death penalty. Lastly, any imposition of the death penalty by the jury should be searchingly reviewed by the appellate courts to insure the absence of unfairness, arbitrariness or caprice in the result.

Regarding the question before us, the statute, G.S. 15A-2000, provides in pertinent part as follows:

> (b) Sentence Recommendation by the Jury.-- . . . In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

. . . .

(c) Findings in Support of Sentence of Death. -- When the jury recommends sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

[Emphases supplied.]

In essence, then, the statute provides that in determining whether to impose death or life imprisonment the jury "must consider" certain aggravating and mitigating circumstances; that the jury's sentence recommendation shall be "based upon" the sufficiency of the aggravating circumstance(s) and the mitigating circumstance(s) and their relative weights; and that "when the jury recommends a sentence of death," it must sign a writing

in which three questions are answered affirmatively and unanimously beyond a reasonable doubt.

From this statutory scheme the legislative intent clearly emerges. The legislature has sought to strike a balance between fairness to the individual defendant and consistency among the cases in which the death penalty is imposed. It has designed a statute which avoids the two extremes of mandatory death penalties or unbridled discretionary action by juries. The legislature intended for the jury to consider: first, the sufficiency of the aggravating circumstance(s); second, whether any mitigating circumstance(s) exist which outweigh the aggravating circumstance(s); and third, based on these considerations whether to recommend a death sentence or life imprisonment. Only when the jury determines to recommend death is the jury required to sign a writing which shows its affirmative, unanimous findings that one or more statutory aggravating circumstances exist beyond a reasonable doubt, that they are sufficiently substantial to make the death penalty appropriate and that the mitigating circumstances do not outweigh the aggravating circumstances.[1] Subsection (b) states in two places that the jury's sentence recommendation is to be based on these considerations, not

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[1]Although the jury is not required by statute to answer these questions unless they recommend death, I believe documentation of the jury's findings in every capital sentencing proceeding, whether they recommend death or life, is necessary for this Court's use in conducting its proportionality review required under G.S. 15A-2000(d)(2).

decreed by them. There is nothing in this scheme to suggest a legislative intent to require the jury to return a sentence of death even if it should answer the three crucial subsection (c) issues affirmatively, just as there is nothing in the statute which permits a jury to ignore the delineated considerations in its deliberations. To hold, as does the majority, that if affirmative answers in writing to these three issues are prerequisite to a jury's recommendation of death, then death must be recommended when the prerequisites are met is, logically, a non sequitur.

This logical trap is easily sprung; it caught me in my dissent in State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, ___ U.S. ___ (1982), where I lapsed into the same fallacy now being urged by the majority.[2] In Rook, however, both my dissent and the majority opinion were addressing a different question, i.e., whether the jury was required to

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[2] In Rook, supra, I wrote:

> Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no matter how it regards the mitigating circumstances. In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more aggravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

304 N.C. at 242-43, 283 S.E.2d at 757 (emphasis original)(footnote omitted).

specify which mitigating factors it found to exist. The question now being addressed was not raised in Rook, and any conclusion about it was not necessary to the dissent. With the benefit of briefing, argument and my own research, I am convinced that my initial conclusion on the point here in issue, as I expressed it in Rook, was wrong, just as I believe the majority's similar conclusion is wrong. The conclusion is not less a non sequitur because I once subscribed to it.

Our trial judges initially properly construed the statute to mean that if the jury answered the three issues affirmatively it could, but was not required to, recommend the death penalty. The first Pattern Jury Instruction promulgated after the statute provided that if the jury answered the crucial issues affirmatively then it "may recommend the death penalty." N.C.P.I. Crim. 150.10, p. 5 (June 1977)(emphasis supplied). A subsequent revision of the instruction emphasized this point by providing that the jury "may, although [it] need not, recommend that the defendant be sentenced to death." N.C.P.I. Crim. 150.10, p. 4 (Replacement, May 1979). These instructions, or a variation of them, have been followed in a large number of death penalty cases.[3]

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[3]See, e.g., State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981)(R. at 192, "you may recommend death"); State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979)(R. at 238, "you may recommend"); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979)(R. at 111, "you may recommend"); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979)(R. at 333, "Based upon these considerations as instructed by the court, you will advise the court whether the defendant should be sentenced to life imprisonment or death"); State v. Cherry, 298

After our decision in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), the Pattern Jury Instruction for our trial judges was changed so as to provide that if the jury answered the three issues affirmatively, it would be its "duty to recommend that defendant be sentenced to death." N.C.P.I. Crim. 150.10, pp. 3-4 (Replacement, May 1980). The case cited in support of this change in the instruction is Goodman.

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N.C. 86, 277 S.E.2d 551 (1979), cert. denied, 446 U.S. 941 (1980) (R. at 341, "Based upon these considerations as instructed by the Court, you will advise the Court whether the defendant should be sentenced to life imprisonment or death"); State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979)(R. at 185, "you may then recommend the death penalty"); State v. Jones, 296 N.C. 495, 251 S.E.2d 725 (1979)(R. at 276, "you may--but are not compelled to--recommend the death penalty").

Other cases reviewed by this Court have contained instructions which went even further in telling the jury that the death sentence was not mandated by affirmative answers to the crucial issues. For example, in State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981)(R. at 668), the jury was told:

> Unless you have answered Issues One, Two, Four 'yes' you must recommend that a defendant in a given case be sentenced to life. Only if you have answered Issues One, Two and Four 'yes' may you recommend that a defendant be sentenced to death. Even then, though, you are not required to do so. You still may recommend life imprisonment. However, if you answered Issues One, Two and Four 'yes' you are, on further deliberations, satisfied beyond a reasonable doubt that the only just punishment for this defendant is--a given defendant in a given case, is the death penalty, then you may so recommend it; realizing, of course, the tremendous responsibility which rests on your shoulders when you make that recommendation.

See, also, State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) (R. at 231, "you would then further deliberate upon your sentence recommendation"); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980)(R. at 618, "Even though you are not required to do so, you may still recommend life in prison").

The issue in Goodman, however, was not whether the jury should be told it has a "duty" to recommend the death penalty if it answers the three issues affirmatively and unanimously. The issue in Goodman was whether, as the defendant contended, the trial court "should have explained to the jury that it had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances." Brief for Defendant Appellant at 15-16. Defendant argued that "[i]t should be incumbent upon the trial Court to explain in detail that no mandatory recommendation of the death penalty is required regardless of findings as to aggravating and mitigating circumstances set forth in the statute." Id.

Thus, defendant Goodman was arguing that the trial court should be required to explain to the jury that it could, in effect, ignore the considerations which by statute it must consider in recommending a life or death sentence. This goes far beyond the permissive instruction actually given and upheld in Goodman, i.e., the instruction that if the jury answered the three subsection (c) issues affirmatively and unanimously, it "may then recommend the death penalty." (R. at 185).

The state's brief in Goodman recognizes that "the Court left the jury with the understanding that, even should they find more aggravating than mitigating circumstances, they could still recommend life imprisonment. . . . At no point did the Court state that the jury could not recommend life imprisonment when the aggravating circumstances outweighed the mitigating.

What the Court was saying was that (even where such aggravating circumstances appeared to be more substantial than mitigating circumstances) the jury could still recommend life imprisonment." Brief for the state at 19-20.

The Court in Goodman answered the defendant's argument as follows, 298 N.C. at 34-35, 257 S.E.2d at 590:

> His argument is that without such instruction the jury will mathematically balance the two types of factors against each other and will impose the death penalty whenever aggravating circumstances outnumber mitigating ones. We do not agree that this is the manner in which a jury will reach its decision on this important question or that the instruction for which defendant contends is required by our statute.
>
> It must be emphasized that the deliberative process of the jury envisioned by G.S. 15A-2000 is not a mere counting process. State v. Dixon, supra; State v. Stewart, supra. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. Nuances of character and circumstance cannot be weighed in a precise mathematical formula.
>
> At the same time, we believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it. For these reasons defendant's seventh assignment of error is overruled. [Emphases supplied.]

The majority's conclusion on this point in the instant case as well as the change in the Pattern Jury Instruction are based on a misreading of Goodman. Goodman simply recognized that, under the instructions as given, there would be no cause for the jury "mathematically" to balance the aggravating against the mitigating and "impose the death penalty whenever aggravating circumstances outnumber mitigating ones." Goodman cautioned that juries should not be instructed in a manner which would cause them to "impose the sanction of death at their own whim." Goodman does not support the proposition that a jury has a duty to impose the death penalty whenever it concludes that the statutory aggravating circumstances are sufficiently substantial to call for it and that the mitigating circumstances are insufficient to outweigh the aggravating. Goodman recognizes that given such determinations, a jury may yet opt for life imprisonment and notes that there is no way to escape some subjectivity in deciding who shall live and who shall die. Juries are called on in this kind of decision, we said in Goodman, to consider "[n]uances of character and circumstance [which] cannot be weighed in a precise mathematical formula."

It is for this reason that a jury ought not be required to return the death penalty simply because it answers the crucial subsection (c) issues affirmatively. Conscientious juries may determine that these issues ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and

not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.[4] We should not construe our statute to require such a jury, nevertheless, to impose it.

Our statute is designed simply to insure that certain specific (subsection (c)) prerequisites are met before the death penalty is imposed. Its only prerequisites for the imposition of life imprisonment are that the jury base such a decision (subsection (b)) on a weighing against each other of various aggravating and mitigating circumstances which it may find to exist. Although the jury may not recommend death without specifically, and in writing, answering subsection (c) issues affirmatively, even if it does so it may yet recommend life.

The United States Supreme Court has made it quite clear that these kinds of death penalty or life imprisonment decisions do not result in the unbridled discretionary determinations found wanting in Furman v. Georgia, 408 U.S. 238 (1972)(per curiam).

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[4]Indeed, juries have answered the crucial subsection (c) issues affirmatively and yet either recommended life imprisonment, State v. King, 301 N.C. 186, 270 S.E.2d 98 (1980); State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979); or were unable unanimously to agree on a sentence, thus requiring the judge to impose a life sentence pursuant to G.S. 15A-2000(b). State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), on resentencing in Columbus Superior Court (Case No. 79CRS1943); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

At least one jury has found ambiguity in the "Issues and Recommendation as to Punishment" form generally submitted to juries deliberating on sentences in capital cases. State v. Lake, 305 N.C. 143, 286 S.E.2d 541 (1981)(copy found in Case No. 80CRS5530, Onslow Superior Court).

In Bullington v. Missouri, 451 U.S. 430 (1981), the Court had before it a Missouri death penalty statute very similar to ours. In Bullington, the Supreme Court noted that a Missouri jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances." 451 U.S. at 434-35. Although the question was not raised, there is no suggestion in Bullington that such a statute would be constitutionally infirm.

In Gregg v. Georgia, supra, 428 U.S. 153, the Supreme Court considered a Georgia death penalty statute which provided that the jury could return a sentence of death only if it found the existence of one of ten statutorily specified aggravating circumstances. The jury was not required to return a death sentence even if it found the existence of one or more of the ten statutorily specified aggravating circumstances and was "not required to find any mitigating circumstance in order to make a recommendation of mercy." Id. at 197. On appeal of his death sentence, defendant argued that because a Georgia jury had "the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present," the statute violated the Furman prohibition against unbridled discretion. Id. at 203. The United States Supreme Court answered by saying:

> This contention misinterprets Furman. . . . Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

428 U.S. at 203 (emphasis supplied). In answering defendant's contention that there were other discretionary decisions which could be made in the processing of a murder case which would result in some candidates for the death penalty actually escaping it, the Supreme Court said:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199. Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, said in a concurring opinion in Gregg:

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail.

428 U.S. at 222 (emphasis supplied).

Finally, in Jurek v. Texas, supra, 428 U.S. 262, the Supreme Court considered a Texas statute which required the jury to impose the death sentence if it answered three questions affirmatively.[5] The attack made on the Texas statute was that it created a mandatory death penalty in violation of the principles laid down in Woodson v. North Carolina, supra, 428 U.S. 280, and Roberts v. Louisiana, supra, 428 U.S. 325. The Supreme Court struggled with this question because the Texas statute appeared to have no provision for the jury to consider mitigating circumstances. "Thus," the Court said, "the constitutionality of the Texas procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. at 272. The Court concluded that the jury's consideration of mitigating circumstances, under the interpretation given the

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[5]The questions are these:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

See 428 U.S. at 269 (quoting Tex. Code Crim. Proc., art. 37.071(b) (Supp. 1975-76)).

second question by the Texas Court of Criminal Appeals, was encompassed in its decision on that question. See supra note 5. Therefore, the Court concluded that the statute was not subject to the "mandatory death sentence" attack.

Apparently under the rationale of Jurek, the majority's interpretation of our statute would pass constitutional muster. But I am satisfied that the interpretation for which I argue is more solidly supported in the decisions of the United States Supreme Court; whereas the majority's view, which could be supported only by Jurek, is at least constitutionally suspect.

Assuming that we are free under the United States Constitution to opt for either interpretation, we should adopt the one which most nearly comports with the legislature's intent as that intent is revealed in the plain words of the statute. The legislature has developed a statutory scheme designed to accommodate the twin "goals of measured, consistent application and fairness to the accused." Eddings v. Oklahoma, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, 8 (1982). In Goodman, supra, 298 N.C. 1, 257 S.E.2d 569, we held that instructions which, in effect, explained to the jury that it could ignore the procedure devised by the legislature were not authorized by our statute and would be contrary to the Furman standards. Likewise, instructions that tell the jury they must impose the death penalty if they answer certain questions affirmatively and unanimously are not authorized by our statute and fail to give appropriate weight to inarticulable, intangible "[n]uances of character and

circumstances." State v. Goodman, supra, 298 N.C. at 34, 257 S.E.2d at 590.

Our statute, like the Supreme Court said of its decision in Lockett,[6] "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, supra, ___ U.S. at ___, 102 S.Ct. at 874, 71 L.Ed.2d at 8. Both the instructions disapproved in Goodman and those given in the instant case upset the statute's finely tuned balance between consistency and sensibility to the uniqueness of an individual. The instruction sought by the defendant in Goodman tilts too much in favor of individualized consideration at the expense of consistency; whereas the instruction given here tilts too much in favor of consistency at the expense of individualized consideration.

The instruction most in keeping with the legislative design and which ought to be given in all cases is that recommended by the Superior Court Judges' Pattern Jury Instruction Committee in May 1979. In that instruction jury members are told that if they answer the crucial issues affirmatively and unanimously, "you may, although you need not, recommend that the defendant be sentenced to death." N.C.P.I. Crim. 150.10 at 4.

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[6]Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS MISAPPREHENDED THE MEANING OF FURMAN V. GEORGIA, 408 U.S. 238, BY HOLDING THAT A CONSTRUCTION OF ITS DEATH PENALTY STATUTE WHICH WOULD PERMIT A JURY TO RENDER A LIFE VERDICT IF IT MADE THREE SEPARATE FINDINGS REGARDING AGGRAVATING CIRCUMSTANCES WOULD CONSTITUTE UNCONSTITUTIONAL UNBRIDLED DISCRETION.

The majority of the court below construed North Carolina's post-Woodson[12] death penalty statute, N.C. Gen. Stat. § 15A-2000 et seq. (1977), Appendix C, infra, to require - instead of permit - a capital verdict upon certain specific jury findings. 292 S.E.2d at 226-27. Petitioner's jury had been instructed that "it had a duty to recommend a sentence of death if it found three things[13] . . .." 292

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Footnote 11 concluded:

249, 283 S.E.2d 761 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982). In the first of these cases, the court characterized §2000(d)(2) as providing it "statutory discretion." Barfield, 259 S.E.2d at 544.

In petitioner's case, the dissenter thought it was time that the court advise the bar "the manner in which it conducts its review." 292 S.E.2d at 242. He, joined by two others, 292 S.E.2d at 229-30, believed the court should compare each death penalty with cases which have been reviewed by the court "whether the jury recommended death or life imprisonment." Ibid. In two affirmances since petitioner's, some passing reference has been given to other affirmed death penalty cases. State v. Williams, ___ N.C. ___, 292 S.E.2d 243, 263-64 (1982) (citing all affirmed death cases), and State v. Smith, ___ N.C. ___, 292 S.E.2d 264, 276-77 (1982) (citing two affirmed death cases). Later, in State v. Brown, ___ N.C. ___, 293 S.E.2d 569 (1982), the court noted that it has not said what group of cases it looks to for its comparisons, 293 S.E.2d at 590, and proceeded "to conclude that the sentence is not disproportionate or excessive considering both the crime and the defendant" without reference to any other case. 293 S.E.2d at 591.

Thus, the North Carolina Supreme Court has now affirmed ten death sentences without any semblance of proportionate review even to other death penalty verdicts. The only attempt at such review was in one case, by a dissenting Justice. State v. Rook, supra, 283 S.E.2d 758-61.

12 Woodson v. North Carolina, 428 U.S. 280 (1976).

13 The three required findings were:

"(1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the

S.E.2d at 227. (Emphasis in original). Petitioner argued that these instructions violated the statute.[14] He

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Footnote 13 concluded:

death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt." 292 S.E.2d at 227. See N.C. Gen. Stat. § 15A-2000(c)(1), (2) and (3) quoted in footnote 14, infra.

14 The relevent portions of the statute are:

(b) Sentence recommendation by the Jury.--- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (3) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (3) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.--- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

contended that the three jury findings are necessary, but insufficient, to support a death verdict; that the statute required that the jury still make the final ultimate choice, whether petitioner should be sentenced to die or to life imprisonment; and that therefore the crucial issue in his case had been withdrawn from his jury by the judge's charge.

The North Carolina Supreme Court rejected petitioner's argument based on its belief that otherwise the jury would be permitted "to exercise unbridled discretion . . .," 292 S.E.2d at 227, prohibited by Furman v. Georgia, 408 U.S. 238 (1972).

Justice Exum, in dissent on this point, put the issue clearly:

> I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones anaylsis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury must return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the

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Footnote 14 concluded:

> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N.C. Gen. Stat. §15A-2000(b) and (c).

majority's discussion,[15] have made it abundantly clear that the majority's interpretation is not constitutionally required. (Emphasis in original).

292 S.E.2d at 230. Justice Exum, finding no barrier in this Court's death penalty decisions to the construction of the statute urged by petitioner, proceeded "'to ascertain the intent of the legislature,'" 292 S.E.2d at 230, and concluded that the jury members should be "told that if they answer the crucial issues affirmatively and unanimously, 'you may, although you need not, recommend that the defendant be sentenced to death,'" 292 S.E.2d at 236, an instruction which had been "recommended by the Superior Court Judges Pattern Jury Instruction Committee in May 1979," ibid, but which was replaced in May 1980 after State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), by the language used by the judge at petitioner's trial.

Since the North Carolina court has interpreted its statute "as it did because it felt under compulsion of federal law as enunciated by this court . . .," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950), a federal question is presented for review. Ibid. State courts are, of course, free to interpret their statutes "solely as a matter of [local] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). However, when a "reading of a whole opinion shows [that the state court

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15 The statement that none of this Court's decisions are "mentioned in the majority's decision" may be somewhat misleading. The majority had said that "defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and then quoted from Goodman including the following:

> The exercise of such unbridled discretion by the jury under the court's instructions would be contrary to the rules of Furman and the cases which have followed it. Id. at 35, 257 S.E.2d at 590.

292 S.E.2d at 227. Thus, the court's holding in this case was specifically grounded -- albeit within a quote -- upon its interpretation of this Court's Eighth Amendment decisions.

ruled] not as a matter of statutory construction, but because it thought the Federal Constitution required such action," Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924), then a federal question is presented for review by this Court. State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939). Moreover, a federal question is also presented if the State court decision rests upon both state and federal law but "these two grounds are so interwoven that [this Court is] unable to conclude that the judgment rests upon an independent interpretation of the State law." Ibid. Furthermore, a federal question remains when "doubt" exists as to whether the State court "did not deem itself bound" by the federal considerations, Missouri ex rel. Southern R. Co. v. Mayfield, supra, or where the decision "might have been decided differently if the court below had felt free, under [this Court's] decisions, to do so." Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443 (1951); United Air Lines v. Mahin, 410 U.S. 623, 632 (1973). See, also Delaware v. Prouse, 440 U.S. 648, 653 (1979).

There is no doubt here that the North Carolina Supreme Court adopted a construction of its statute as it did because it "deem[ed] itself bound," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. at 4, by "'the rules of Furman [v. Georgia, 408 U.S. 238] and the cases which have followed it.'" 292 S.E.2d at 227.

It was expected by the litigants below that this "extremely important new question dealing with the construction of our death penalty statute," 292 S.E.2d at 230 (Exum, J. dissenting), would be controlled by the court's interpretation of Furman. The issue originated from language in the court's decision in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). There the jury had been instructed that if it

answered the three statutorily required "issues affirmatively and unanimously, it 'may then recommend the death penalty.' (R. at 185)." 292 S.E.2d at 233 (Exum, J. dissenting). (Emphasis in original). It had not been instructed, as was petitioner's jury, that after making those findings it was then duty bound to recommend death. Goodman argued on appeal that there should have been further instructions that the jury, "'had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances.' Brief for Defendant Appellant at 15-16." Ibid. The court rejected that argument specifically relying upon its understanding of Furman. The Court held that to adopt Goodman's proposed instructions,

> would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.

298 N.C. at 35, 257 S.E.2d at 590.

As noted above, prior to Goodman, the North Carolina Pattern Jury Instructions promulgated by a committee of the Conference of Superior Court Judges had advised trial judges to instruct the jury that it "'may although it need not, recommend that the defendant be sentence to death,'" 292 S.E.2d at 232 (Exum, J. dissenting), upon making the statutory findings. Such instructions "or a variation of them" were given "in a large number of death penalty cases."[16] In some case, where jurors were so instructed, defendants received life sentences notwithstanding affirmative answers to the three issues. Id. at 234 n.4.

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16 Many such cases are listed at 292 S.E.2d at 232 n.3 (Exum, J. dissenting).

In reliance upon Goodman, the Pattern Jury Instructions were changed in May 1980 to impose a "duty to recommend that the defendant be sentenced to death," id. at 233, if the necessary findings were made in favor of the State.

In the North Carolina Supreme Court, petitioner not only advanced arguments in support of his contention that the General Assembly had intended that jurors be permitted to recommend life imprisonment notwithstanding findings of aggravating circumstances sufficient to call for the imposition of the death penalty which outweighed mitigating circumstances; he also sought to respond to the concerns expressed by the court in Goodman that such a construction might run afoul of the prohibitions against unbridled jury discretion.

The State, in its brief, chose to ignore all of petitioner's traditional arguments regarding legislative intent. The court had previously canvassed the legal and legislative history of the 1976 enactment and concluded that the General Assembly had, even more than the legislators of Georgia and Florida, borrowed extensively from the Model Penal Code (MPC). State v. Johnson I, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-610 (1979).

> The North Carolina statute follows both in broad outline and in detail the MPC even more closely than did the statutes of Georgia and Florida. This is appropriate inasmuch as the concerns to which the MPC was addressed were the same as those considered controlling in the leading opinions of the United States Supreme Court in the cases discussed above.

298 N.C. at 62-63. Petitioner, therefore, argued that since under the models for the North Carolina statute, which had been approved by this Court, juries are free to recommend life regardless of any subsidiary findings, see Proffitt v. Florida, 428 U.S. 242, 248; Gregg v. Georgia, 428 U.S. 153, 165-166, 207; MPC, Section 210.6(2); such a construction of

the North Carolina statute was intended by the General Assembly. The State's brief had no answer to these arguments.

The total thrust of the State's brief was that petitioner's construction would be unconstitutional. Brief for the State, pp. 67-72. "If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman simply does not allow." Id. at 72.

The State prevailed below on exactly the ground it had advanced. The majority held that petitioner's construction would result in "unbridled" jury discretion allowing the jury "arbitrarily or capriciously [to] impose or reject a sentence of death." 292 S.E.2d at 227 (emphasis in original). The opinion on this point concluded with the quotation from Goodman that "'The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.'"[17] Ibid.

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17 The Court's full treatment of petitioner's assignment of error was as follows:

> Both the prosecutor and the trial court advised the jury that it had a duty to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumsances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the stautory directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]
>
> Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudically withdrew from the jury its final option . . . to recommend a life sentence nothwithstandng its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

A reading of the "opinion as a whole," State Tax Commission v. Van Cott, supra, shows that the "majority construe[d] the statute in this way on the sole ground that otherwise the statute would be subject to constitutional attack that a jury could decide between life and death in its unbridled discretion." 292 S.E.2d at 230 (Exum, J. dissenting). At the very least, "[g]iving the opinion of the Supreme Court of [North Carolina] a scope most favorable to reliance on a non-federal ground, doubt still remains

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Footnote 17 concluded:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." State v. Johnson [I], 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); see State v. Barfield, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in Goodman, explained that:
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> > [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.
>
> Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommnd a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17] (Emphases in original; footnotes omitted).

whether that court did not deem itself bound [to rule as it did] by its view of the demands of [this Court's] decisions . . .." Missouri ex rel. Southern R. Co. v. Mayfield, supra. Accordingly, an important federal question emerges. Moreover, "[t]he possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." United Air Lines v. Mahin, 410 U.S. 623, 630-31 (1973).

The federal question presented is a critical one for which state courts and legislatures "deserve the clearest guidance that the Court can provide." Lockett v. Ohio, 438 U.S. 586, 602 (1978). It is whether a state procedure which requires, for any capital jury verdict three separate findings regarding statutorily defined aggravating circumtances, but would leave to the jury finally "to dispense mercy on the basis of factors too intangible to write into a statute . . .," Gregg v. Georgia 428 U.S. 153, 222 (Opinion of White, J.), is "consistent and principled but also humane and sensible as to uniqueness of the individual," Eddings v. Oklahoma, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d, 1, 8 (1982), or allows unbridled discretion condemned by Furman.

Petitioner had thought that it was clear that the extent of jury discretion which would remain if the North Carolina statute were construed as he contended the legislature intended would not be "capricious" in a constitutional sense under Furman, but instead would be "guided" as required by Gregg. That seemed to him to be the holding of Gregg. See, 428 U.S. at 199, 203 (prevailing Opinion); id. at 199 (Opinion of White, J. joined by the Chief Justice and

Rehnquist, J.). Whatever the holding of Gregg, the division of the court below demonstrates that "confusion," Lockett, 438 U.S. at 599, persists as to what satisfies both Eighth Amendment procedural commands "of measured consistent application and fairness to the accused." Eddings v. Oklahoma, ___ U.S. ___, at 102 S.Ct. at 847, 71 L.Ed.2d at 8 (1982).

If the majority below is correct, then this Court should so declare since, as pointed out by Justice Exum, statutes previously before this Court from other States would almost certainly be unconstitutional under Furman. 292 S.E.2d at 234-36. If, on the other hand, Justice Exum's conclusion that "the majority's interpretation is not constitutionally required," 292 S.E.2d at 230, then this Court "should so declare, leaving the State court free to decide the . . . issue solely as a matter of [North Carolina] law." Zacchini v. Screpps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); see, also, Delaware v. Prouse, supra; United Air Lines v. Mahin, supra; Perkins v. Benguet Consol. Mining Co., supra; Missouri ex rel. Southern R. Co. v. Mayfield, supra; State Tax Commission v. Van Cott, supra; Red Cross v. Atlantic Fruit Co., supra.

If the decision below remains uncorrected, capital defendants will face trial in North Carolina under a considerably more mandatory statute than the General Assembly may have intended. Moreover, the decision below stands as a bar to any revision of the statute to permit a greater measure of jury discretion as long as the General Assembly desires to maintain a constitutional statute. See, Woodson, 428 U.S. at 300. Accordingly, this Court should grant certiorari in order to "remand the case to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under [this

Court's] decisions, to do so.' Perkins v. Benguet Consol. Mining Co., 342 U.S. at 443." United Air Lines v. Mahin, 410 U.S. at 632.

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: August 31, 1982.

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